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No. 03-101

IN THE

Supreme Court of the United States

GALE NORTON, Secretary of the Interior, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF OF DEFENDERS OF WILDLIFE AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Defenders of Wildlife is a non-profit organization dedicated to the protection of native animals and plants in their natural communities. It focuses its actions on curtailing two of the most serious environmental threats to the planet: the accelerating rate of extinction of species, and habitat alteration and destruction. Defenders of Wildlife has thousands of members who regularly enjoy recreating in the areas administered by the Bureau of Land Management that are at issue in this case.

Defenders of Wildlife also regularly relies on the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(1), (2), and the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, as well as the Council on Environmental Quality's binding regulations, 40 C.F.R. §§ 1500-1508, in bringing cases in federal court to ensure compliance with laws enacted to protect the environment.

Public Citizen, Inc., is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating regulatory delay, particularly in the promulgation of critically important public health and safety regulations (for example, delays by the Occupational Safety and Health Administration in promulgating workplace safety

1. None of the attorneys for the parties in this case authored any of this *amici* brief, and no one other than *amici* made any monetary contribution to the preparation or submission of the brief. *Amici* have received the written consent of the parties to file this brief, and such consents are being lodged herewith.

and health standards, and delays by the Food and Drug Administration in protecting the public from adverse effects of prescription and over-the-counter drugs).

In pursuit of this objective, Public Citizen has, too often, found it necessary to invoke section 706(1) of the APA to challenge unreasonable delay by agencies in concluding matters before them – delay that often is measured in years, if not decades. Indeed, many of the unreasonable delay cases cited later in this brief were filed by Public Citizen lawyers. Public Citizen is therefore vitally concerned that the availability of the APA as a tool to counter extreme agency delays not be limited by the Court's decision in this case.

Defenders of Wildlife and Public Citizen (hereinafter collectively referred to as "*Amici*") are submitting this *amicus* brief for two reasons. First, *Amici* wish to ensure that, in reviewing the narrow issues under review, this Court does not inadvertently adopt a view of the scope of the "unreasonable delay" prong of section 706(1) that, although not implicated in this particular case or necessary for the Court's review, is nevertheless misstated in the brief that has been submitted by the government. Second, *Amici* wish to clarify that the agency's duty in this case to prepare a Supplemental Environmental Impact Statement ("SEIS") stems from the requirement in the binding Council on Environmental Quality ("CEQ") regulations that all agencies "shall prepare" an SEIS – and make a judicially reviewable decision as to whether additional environmentally protective measures are required – whenever "[t]here are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

SUMMARY OF THE ARGUMENT

I. Because the Administrative Procedure Act, 5 U.S.C. § 555(b), requires agencies to conclude proceedings "within a reasonable time," and it further provides that a federal court "shall . . . compel agency action . . . unreasonably delayed," 5 U.S.C. § 706(1), a plaintiff with Article III standing may bring a claim challenging an agency's failure to conclude an agency proceeding within a reasonable time, whether or not the agency has a mandatory obligation under an *additional* statute to undertake that particular proceeding.

II. The binding regulations of the Council on Environmental Quality ("CEQ") require an agency to prepare a Supplemental Environmental Impact Statement ("SEIS") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, whenever "there are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(ii), and the CEQ regulations further require that, if such circumstances are present, the agency must, in connection with the preparation of the SEIS, also issue a "Record of Decision" as to whether, and to what extent, the agency will modify its action to take such new information into account. Therefore, a federal court may entertain a plaintiff's claim, pursuant to 5 U.S.C. § 706(1), that the agency has failed to prepare the requisite SEIS.

ARGUMENT

I. A Claim Brought Under The "Unreasonably Delayed" Prong Of Section 706(1) Does Not Depend On A Separate Mandatory Statutory Obligation To Undertake The Particular Action.

Section 706 of the APA provides that a reviewing court "*shall* . . . compel agency action unlawfully withheld *or unreasonably delayed*." 5 U.S.C. § 706(1) (emphasis added). In the course of ruling that the plaintiffs in this case adequately pled a claim for relief under this provision, the Court of Appeals for the Tenth Circuit stated that "[u]nder either the 'unreasonably delayed' or 'unlawfully withheld' prongs of § 706(1), federal courts may order agencies to act *only where the agency fails to carry out a mandatory, nondiscretionary duty*," and that "[b]y contrast, *if a duty is not mandated*, or if an agency possesses discretion over whether to act in the first instance, *a court may not grant relief under § 706(1)*." 301 F.3d 1217, 1226 (10th Cir. 2002) (emphasis added). In its brief to this Court, the government states that Section 706(1) is only available "to compel a discrete final action *that an agency is required by law to take or complete*." Government's Brief ("Gov't Brf.") at 24 (emphasis added).

These statements concerning the scope of Section 706(1) may properly apply to actions seeking to compel agency action "unlawfully withheld." Furthermore, in this case, plaintiffs have certainly asserted that the Bureau of Land Management ("BLM") *does* have a mandatory duty under the Federal Land Management Act to "manage" Wilderness Study Areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness,"

43 U.S.C. § 1782(c), and also to "manage the public lands . . . in accordance with the [agency's] land use plans," 43 U.S.C. § 1732(a). *See* Second Amended Complaint, Claims Five and Six. However, under long standing precedent, an agency need not have a mandatory duty, independent of the APA, to take some particular action in order for plaintiffs to properly allege a claim under § 706(1) that an agency has "*unreasonably delayed*" taking that action.

On the contrary, because the APA itself imposes a separate obligation on all agencies to conclude matters "within a reasonable time," 5 U.S.C. § 555(b), there is no *additional* requirement that a plaintiff alleging a violation of this command point to some other mandatory statutory duty to undertake the particular action at issue. Rather, whether the agency has a mandatory duty under its organic statute to take a particular action, or has been petitioned by a member of the public to undertake a *discretionary* action, or the agency itself has decided to undertake such an action in the exercise of its statutory authority, a plaintiff with Article III standing may challenge the agency's failure to complete any such undertaking "within a reasonable time." And, if the court agrees that the delay is "unreasonable," then it "shall" compel the agency to make a final decision, one way or another, 5 U.S.C. §§ 555(b), 706(1).

As this Court observed in *General Motors Corp. v. United States*, 496 U.S. 530, 539 (1990), section 555(b) of the APA itself imposes this "mandate" on agencies, since the public affected by agency proceedings – whether rulemaking, licensing, or ratemaking – has an overriding interest in having ongoing proceedings brought to some conclusion "within a reasonable time," so that the affected public is not indefinitely

left in limbo as to an agency's intentions. As the Court of Appeals for the D.C. Circuit has explained, "quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans." *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

Indeed, in *General Motors*, this Court recognized that, pursuant to section 555(b), the Environmental Protection Agency must approve a state's revised implementation plan under the Clean Air Act "within a reasonable time," once the agency determines that the state's revision meets the substantive requirements of the underlying statute, despite the fact that the EPA has a great deal of discretion under the statute to determine *whether* the state has met those requirements. *General Motors*, 496 U.S. at 539-41; *see also e.g.*, 42 U.S.C. § 7410(a)(2) (state implementation plans shall provide for "appropriate" devices, methods, systems, and procedures "necessary" to monitor data on ambient air quality); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1100 (D.C. Cir. 2003) (district court has jurisdiction pursuant to 5 U.S.C. §§ 555(b), 706(1), to decide whether agency has unreasonably delayed processing putative tribe's petition for recognition); *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 150-51 (3d Cir. 2002) (recognizing that section 706(1) creates a right of action to review unreasonable delay in promulgation of OSHA occupational exposure standards despite agency's "quintessential discretion" to allocate resources); *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 57 (D.C. Cir. 2002) (once agency announces intention to revisit its own discretionary policy and receives comment on that

proposal, it is under a duty to make a final decision within a reasonable time); *Cobell v. Norton*, 240 F.3d 1081, 1096-99 (D.C. Cir. 2001) (Department of Interior has fiduciary duty, irrespective of any statutory obligation, to provide Indian trust fund beneficiaries an accounting of their funds within a reasonable time); *In re International Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (*per curiam*) (court has jurisdiction to hear plaintiffs' complaint that Occupational Health and Safety Administration unreasonably delayed final decision on rulemaking petition for occupational exposure standard); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987) (court has authority under unreasonable delay provisions of the APA to order agency to issue a workplace standard by a specific date); *Oil, Chemical and Atomic Workers Intern. Union v. Zegeer*, 768 F.2d 1480, 1484-85 (D.C. Cir. 1985) (court has jurisdiction to decide whether Mine Safety and Health Administration response to petition for standard was unreasonably delayed); *Public Citizen Health Research Group v. Commissioner, Food and Drug Administration*, 740 F.2d 21, 34 (D.C. Cir. 1984) (court has jurisdiction to decide whether agency has unreasonably delayed acting on citizen petition for warning label on aspirin products); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (court has jurisdiction under APA sections 555(b) and 706(1) to compel agency to complete rulemaking regarding occupational exposure standards within a reasonable time).

In its brief to this Court, the government acknowledges that there is no need for a separate mandatory duty with respect to several kinds of cases. Gov't Brf. at 20. Thus, it states that "Section 706(1) permits a court to order an agency to respond to a rulemaking petition within a reasonable time

. . . or to make a 'final determination' on an administrative complaint . . . or to act on a permit application." *Id.* (internal citations omitted). However, the government omits an extremely important category from this list: the situation where the agency on its own initiates a specific administrative proceeding – even a discretionary one – but fails to bring it to a conclusion "within a reasonable time." 5 U.S.C. § 555(b).

In such cases, pursuant to 5 U.S.C. §§ 555(b) and 706(1), a court may review a proper plaintiff's complaint that the agency has "unreasonably delayed" concluding that proceeding, and, should the court agree with the plaintiff's contention, pursuant to section 706(1), the court "shall" order the agency to reach a final decision. *See, e.g., Interstate Natural Gas Ass'n of America*, 285 F.3d at 57; *see also Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998) (even though agency had discretion to determine best way to reduce aircraft noise over Grand Canyon, once agency issued Advance Notice of Proposed Rulemaking, court may entertain petition to compel the agency to complete the proceeding within a reasonable time); *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987) ("[o]nce the FDA elected to respond to its legislative directive [that over the counter drugs be both safe and effective] by establishing the OTC [over-the-counter] drug review program, the APA imposed an obligation to proceed with reasonable dispatch," (*relying on* 5 U.S.C. §§ 555(b), 706(1))); *Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 73, 76-77 (D.C. Cir. 1984) (where agency has issued its own "notice of inquiry" and solicited public comment on a particular matter, it must conclude that proceeding within a reasonable time).

As Judge D.H. Ginsburg succinctly explained in *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987):

> Unlike claims alleging agency recalcitrance in the face of a 'clear statutory duty,' the petitioner alleging 'unreasonable delay' does not contend that agency inaction violates a clear duty to take a particular action by a date certain. Instead . . . the claim is that *while the agency may have discretion over whether to act at all*, it has exercised that discretion by deciding that it would determine what action, if any, to take, and that *it must now do so.*

(Emphasis added); *see also id.* ("[A]gencies most often fall under this duty of timeliness as a result of the *APA's broad prohibition against 'unreasonable delay*[,]'" (*citing* 5 U.S.C. §§ 555(b), 706(1)), [but] "[i]n other situations, the substantive statute itself may impose the obligation.") (emphasis added).[2]

Of course, in an "unreasonable delay" case, all the reviewing court may do is require the agency to make a final decision one way or another – *i.e.*, the court may not compel any particular substantive result. However, the court may certainly exercise jurisdiction over that case, whether or not the agency has some *additional* statutory obligation – apart from sections 555(b) and 706(1) of the APA – to undertake or complete that particular proceeding. Accordingly, *Amici* respectfully urge that, whatever ruling this Court issues in this case, there is no reason for it to disturb – or even to

2. As the foregoing cases demonstrate, the mere fact that § 555(b) states that the agency shall complete matters "presented to it" within a reasonable time does not foreclose a § 706(1) claim where the agency itself has initiated the proceeding.

address – this well established rule of administrative law, especially when this particular issue is not necessary to the resolution of this case.

II. The BLM's Obligation To Prepare A Supplemental EIS Stems From A Mandatory Duty Imposed By The Binding Council On Environmental Quality Regulations.

Amici also wish to stress that whether the Bureau of Land Management is obligated to prepare a Supplemental EIS in this case is dictated by NEPA, 42 U.S.C. § 4332(2)(C), and the CEQ regulations that implement that statute, 40 C.F.R. § 1500.1, *et seq.* As this Court has noted, *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979), and the government acknowledges, Gov't Brf. at 43, these regulations apply to all federal agencies. *See also Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C. 1991) (The CEQ regulations "define the terms of NEPA and detail the responsibilities of federal agencies.").

NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. Its basic purpose is to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take decisions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). To accomplish these objectives, NEPA mandates that "*to the fullest extent possible*" agencies "shall" prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(2)(C) (emphasis added). This Environmental Impact Statement ("EIS") must analyze the environmental impact of the proposed action, as well as alternative courses of action that would have fewer adverse impacts. *Id.*

The CEQ regulations further provide that an agency "shall" prepare a Supplemental EIS ("SEIS") when "*[t]here are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.*" 40 C.F.R. § 1502.9(c)(ii) (emphasis added). As with the initial EIS, the purpose of an SEIS is "to serve as an *action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.*" 40 C.F.R. § 1502.1 (emphasis added). Indeed, NEPA and its obligations apply to "major federal actions," including "new and *continuing activities*," as well as "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a) (emphasis added).

Accordingly, the government wrongly states that NEPA imposes no "obligation on BLM to conduct an environmental analysis divorced from a *proposed* 'major Federal action.'" Gov't Brf. at 46 (emphasis added). On the contrary, because the plaintiffs have alleged that increased use of off-road vehicles is in fact causing significant environmental damage to the BLM lands at issue, and that BLM is also required by law to *monitor* the effects of ORV use on public lands, the plaintiffs have sufficiently alleged a viable claim pursuant to NEPA's implementing regulations and 5 U.S.C. § 706(1), that the courts may compel the production of an SEIS due to the presence of significant new information and circumstances. *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (in deciding a motion to dismiss the court "must accept as true all material allegations of the complaint"); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969) (the complaint must be "liberally construed in favor of the plaintiff[s]").

Whether an SEIS is ultimately required here goes to the *merits* of the plaintiffs' claim, not to whether the district court has jurisdiction even to hear that claim. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989) (whether SEIS was required is controlled by the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)). However, as this Court explained in *Marsh*, an agency must prepare a Supplemental EIS "if the new information is sufficient to show that the remaining action will . . . 'affect the environment' in a significant manner *or to a significant extent not already considered*." 490 U.S. at 374 (1989) (emphasis added) (internal citations omitted). In addition, the CEQ regulations provide that, where either an EIS or SEIS is required, the agency "*shall prepare a concise public record of decision*" which "shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable," and (c) "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2 (emphasis added).[3]

In short, under the CEQ regulations, where an SEIS is required, it *must* be accompanied by a record of decision – known as an "ROD" in NEPA parlance – stating whether,

3. The Court's statement in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998), in the context of discussing the ripeness of a NEPA claim, that "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper," further reinforces the justiciability of a plaintiff's claim that an agency has completely failed to prepare an SEIS, as required by the CEQ regulations.

and the extent to which, the agency has decided to modify its action in light of the "new information" bearing on the adverse environmental impacts of that action. 40 C.F.R. § 1505.9; *see, e.g., US Ecology, Inc. v. United States Department of the Interior*, 231 F.3d 20, 22 (D.C. Cir. 2000) ("NEPA regulations *require the agency to prepare a Record of Decision justifying its ultimate decision*" following preparation of an EIS) (emphasis added); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371 (D.C. Cir. 1999) ("In a case requiring an EIS, *the agency must prepare a 'concise public record of decision'* that identifies all the alternatives it has considered and describes all factors it has taken into account in reaching its decision," (*quoting* 40 C.F.R. § 1505.2)) (emphasis added); *Valley Community Preservation Commission v. Mineta*, 231 F. Supp. 2d 23, 39 (D.D.C. 2002) ("In situations where an EIS is required, the agency is required to prepare 'a concise public record of decision' that describes the factors it considered in making its decision, and must identify 'all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered,'" (*quoting* 40 C.F.R. § 1505.2)); *California Department of Health Services v. Babbitt*, 46 F. Supp. 2d 13, 21 (D.D.C. 1999) ("NEPA regulations provide that the agency announce its decision among the alternatives analyzed in the EIS in the ROD," (*citing* 40 C.F.R. § 1505.2)), *vacated in part on other grounds*, 231 F.3d 20 (D.C. Cir. 2000); *see also* 40 C.F.R. § 1502.1 (NEPA serves as "an action-forcing device").

Accordingly, the government's assertion that the district court had no jurisdiction over the plaintiffs' NEPA claim because an SEIS itself is not an "agency action" that can be compelled by the court pursuant to 5 U.S.C. § 706(1), Gov't Br. at 44, is also wrong. If plaintiffs are correct that an SEIS

must be prepared under the CEQ regulations because there is significant new evidence of environmental impacts never previously considered by the agency, then the regulations also unequivocally require that an ROD must be prepared by the agency, as in all "cases requiring environmental impact statements." 40 C.F.R. § 1505.2. In turn, it is well-established that an ROD *is* a final agency action that is judicially reviewable under the APA. *See, e.g., Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (it is "well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for purposes of the APA"); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999) (the "designation of the ROD as final agency action under the APA is generally recognized"); *see also Corridor H Alt.*, 166 F.3d at 374 (reviewing a ROD); *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066, 1080 (E.D. Cal. 2002), *rev'd in part on other grounds*, 348 F.3d 789 (9th Cir. 2003) ("The court thus concludes that Defendants' decision as set forth in the . . . ROD . . . is now ripe for review"). Hence, even under the government's own analysis as to when claims may be brought under section 706(1) of the APA – *i.e.*, where the court is being asked for relief that will result in final agency action reviewable under section 706(2) of the APA – a claim that the CEQ standards for preparing an SEIS and accompanying ROD are satisfied is clearly cognizable.

Finally, it is important to recognize that, if such claims were *not* cognizable in any fashion, except when the government itself *opts* to embark on a new decisionmaking process – as the government would have this Court rule – this would completely undermine the basic purpose of NEPA. As this Court explained in *Marsh*, "[i]t would be incongruous" with NEPA "for the blinders to adverse

environmental effects, once unequivocally removed, to be restored prior to the completion of the agency action *simply because the relevant proposal has received initial approval*." 490 U.S. at 371 (emphasis added). Yet, under the government's proposed approach, an agency would be completely free, following initial project approval, to "restore" the "blinders" even to devastating new environmental impacts, as long as the agency insists that it has made no *new* decision based on those impacts. Indeed, the government's approach has the truly perverse effect of *rewarding* an agency for remaining as blind as possible to new evidence of environmental problems, since, if it does so, it can avoid any judicial review of its NEPA compliance. However, it is impossible to reconcile that result with NEPA's purposes, as construed by this Court in *Marsh*, and, contrary to the government's insistence, it certainly is *not* a result that is dictated by the APA.

CONCLUSION

Amici respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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